

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

DOCKET NO. 2004-329

June 22, 2004

UNICAP, INC.
d/b/a UNITEL LONG DISTANCE
Petition for Finding of Public Convenience
And Necessity to Provide Service as an
Interexchange Telephone Utility

ORDER GRANTING AUTHORITY
TO PROVIDE INTEREXCHANGE
SERVICE AND APPROVING
SCHEDULE OF RATES AND
TERMS AND CONDITIONS

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

In this Order, the Commission grants UniCap, Inc. d/b/a UniTel Long Distance (Company) the authority to provide facilities-based interexchange service in the franchise service area of UniTel and approves the Company's Terms and Conditions and Rate Schedules, Original Pages 1 through 12, as filed on May 19, 2004.

I. APPROVAL OF APPLICATION TO SERVE

On May 19, 2004, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, UniCap applied for authority to provide facilities-based interexchange service in the service area of UniTel, Inc. in Maine. Before we grant approval under § 2102 for another public utility to provide service, 35-A M.R.S.A. § 2105 requires us to find that the public convenience and necessity require another utility to provide service in a location where a utility is already authorized to provide, or is providing, the same or similar service.

The Telecommunications Act of 1996, 47 U.S.C. § 253(a), states:

(a) In General. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service.

47 U.S.C. § 253(b) states, however:

(b) State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

We find that granting UniCap the authority to provide interexchange services in Maine will not impede the preservation or advancement of the public interest goals or policies stated in section 253(b).

UniCap's application provides reasonable information indicating that its financial and management capabilities are adequate to provide local and interexchange services in Maine.

II. SERVICE TERRITORY

UniCap has requested authority to provide interexchange service only in the area that UniTel, Inc. provides local exchange service. We grant that authority.

III. APPROVAL OF TERMS AND CONDITIONS AND RATE SCHEDULES

We allow the terms and conditions proposed by UniCap to go into effect. UniCap has substantially used the Commission's standard terms and conditions that comply with Maine law and the Commission's Rules. We have reviewed the Company's petition, Terms and Conditions, and Rate Schedules, and they appear to comply with Maine law and the Commission's Rules. Nevertheless, if there is any conflict between a provision in UniCap's terms and conditions and the Commission's Rules or a statute, the rule or statute will control.

In general, the Commission believes that a competitive telecommunications market results in services and rates that benefit the public. We believe that the acceptability of UniCap's services and rates in the market place provides an adequate test of the reasonableness of the Company's rates. Accordingly, we allow the rates proposed by UniCap to go into effect.

IV. PAYMENT OF ACCESS CHARGES

Our approval of UniCap's application to provide interexchange service in Maine is conditioned on the payment of access charges to local exchange carriers (LECs) who have on file with the Commission approved access charge rate schedules. It must pay access charges directly to local exchange carriers. UniCap's service area for originating interexchange service is limited to the local exchange service area of its affiliated interest, UniTel, and we understand that UniCap will purchase originating access service from UniTel. At present, there is no other originating access provider in UniTel's service area.

UniCap has not applied for, and we do not grant, authority to provide interexchange service as a switchless reseller.

V. INAPPLICABILITY OF CHAPTER 280 WAIVERS; WAIVER OF CHAPTER 120; REPORTING REQUIREMENTS; LIMITED WAIVER OF 35-A M.R.S.A. § 708;

Chapter 280, Sections 11(A) and 12(A) provide waivers from the accounting requirements of Chapter 210 and the reorganization approval requirements of 35-A M.R.S.A. § 708(1). Section 11(A) states "All interexchange carriers subject to the

authority of the Commission are exempt from the annual report and other requirements of Chapter 210 (Uniform System of Accounts for Telephone Utilities) of the Commission's Rules."¹ Section 12(A) states "interexchange carriers subject to the jurisdiction of the Commission shall be exempt from the requirement that each reorganization (defined in 35-A M.R.S.A. § 708(1)) of a public utility be approved by the Commission." We are not certain, however, that it was the intent of Chapter 280 to exempt entities such as UniCap from the requirements of Chapter 210 and 35-A M.R.S.A. § 708.

UniCap is an affiliate of the incumbent LEC (UniTel) that serves in the same area as UniCap. UniCap will operate under the d/b/a UniTel Long Distance. The similarity in names makes it likely that customers will correctly assume there is a significant association between their local exchange service provider and the interexchange provider of virtually the same name. Present customers who do not choose another carrier following the notice required by this Order will default to UniCap as their presubscribed interexchange carrier. These circumstances are similar to those that exist at Pine Tree Telephone and Telegraph Company (Pine Tree) and Saco River Telegraph and Telephone Company (Saco River). Each of those companies also is a long distance provider and each serves as a default carrier. The most significant difference is that Pine Tree and Saco River do not have separate affiliated entities that sell the interexchange service. Verizon of New England d/b/a Verizon Maine also is an ILEC that provides local and interexchange service. It provides local service within its own extensive local service area (which includes a majority of Maine customers), but it provides interexchange service not only to those customers but to customers of

¹ The full text of Section 11 states:

§ 11 REPORTS AND RECORDS

A. **Annual Reports.** All interexchange carriers subject to the authority of the Commission are exempt from the annual report and other requirements of Chapter 210 (Uniform System of Accounts for Telephone Utilities) of the Commission's Rules. They shall, however, annually provide the Commission, in a manner prescribed and on forms specified by the Commission, with a report of its annual revenues, total minutes of use sold, the annual revenues derived from sales for resale and the number of minutes of use sold to resellers.

B. **Records.** All telecommunications carriers subject to the provisions of this Chapter shall maintain records sufficient to identify and to allow auditing of traffic volumes, intrastate interexchange billings for both retail and wholesale services, and all information that is necessary to calculate access or interconnection charges in accordance with this Chapter. Those records shall be maintained for a minimum of 2 calendar years.

independent ILECs, where those ILECs do not provide their own interexchange service.²

Because of the considerations described above, we have some doubt whether we should consider UniCap to be a “competitive” IXC. We also have some doubt whether the exemptions in Chapter 280 were intended to apply to interexchange carriers that are not “competitive” to service provided by an incumbent or as closely associated with an ILEC as is UniCap.

Chapter 280 generally applies to “competitive” telecommunications carriers, as indicated the “General Applicability” provision in Section 3(A), which states “This section applies to all interexchange and local competitive telecommunications services.” Section 4 of Chapter 280 governs applications for authority to provide “competitive” local exchange or interexchange service. Finally, Chapter 280’s title (“Provision of Competitive Telecommunications Services”) indicates that the provisions of the chapter are limited to competitive carriers. We recognize that the “exemption” provisions in question (Sections 11(A) and 12(A)) literally apply to “interexchange carriers,” but, in light of the overall purpose of the Chapter, we doubt they were intended to apply to a carrier such as UniCap that is so closely associated with an existing ILEC and will provide service only in the area served by that ILEC.

We do not need to decide those issues here, however, because, regardless of the intent of Chapter 280, we find that we may separately address whether to grant waivers of the accounting requirements of Chapter 210, the approval requirements of 35-A M.R.S.A. § 708 for reorganizations, and the approval requirements of 35-A M.R.S.A. § 707 for contracts or arrangements with affiliated interests.³

We find that it is appropriate to grant a waiver of Chapter 210 to the same extent as it is granted under Chapter 280, § 11. UniCap will in effect take over the role of Verizon as an interexchange carrier providing interexchange service in the UniTel service area. Like Verizon, it will pay access charges to UniTel. We will continue to regulate both the local rates of UniTel and the amount that UniTel receives from the Maine Universal Service Fund, but we see no present need to require UniCap to file a full annual report.⁴ Thus, although Section 11 may not be directly applicable to UniCap,

² Verizon does not provide interexchange service in the service areas of Pine Tree and Saco River and has stated that it will not be providing interexchange service in the UniCap service area.

³ Chapter 120, § 12(A) waives only the Section 708 (reorganization) approval requirement. It does not waive the Section 707 (contracts with affiliates) of Section 708. However, orders we have issued for virtually all competitive interexchange and local carriers have granted waivers of Section 707.

⁴ UniCap must of course follow generally accepted accounting principles (GAAP) and other accounting requirements of the Commission, and must be able to provide

we will grant an identical waiver. UniCap will need to comply with the limited reporting requirements described in Chapter 280, § 11(A)⁵ and the record maintenance requirements of Section 11(B).⁶

We find that it is not appropriate to grant the full waivers contained in Chapter 280, § 12 of the approval requirements of 35-A M.R.S.A. § 708. To the extent necessary (if Chapter 280, § 12 actually did apply), we exercise our waiver and exemption authority under Chapter 280, § 15 and Chapter 110, § 103 to rule that the Chapter 280, § 12 waiver for competitive IXCs will not apply to UniCap; in effect, we un-waive the waiver.

Instead, we grant UniCap a partial waiver of the reorganization approval requirement of 35-A M.R.S.A. § 708(1) that is identical to the partial waiver granted previously to its affiliate UniTel in *UniTel Inc., Request for Exemption from Required Approvals of Certain Reorganizations Under 35-A M.R.S.A. § 708*, Docket No. 98-528, Order Granting Exemption (September 8, 1998). That order expressly did not grant a waiver of the approval requirement of Section 707, and we find that such a waiver is not appropriate here because of the high likelihood that UniTel will perform services to UniCap in addition to selling it access services. Both UniCap and UniTel must adhere to all affiliate transaction requirements contained in 47 C.F.R. Part 32 (USOA) in their dealings with each other. UniCap has requested that it be allowed a short period of time to seek approval of any contracts or arrangement it may have with affiliated interest. We grant that request. In effect, we are granting a temporary waiver of the approval requirement of Section 707 for the time that we will allow UniCap to file for approval (42 days) plus the length of our proceeding to consider the request.

VI. NOTICE TO CUSTOMERS

UniCap has proposed to acquire all of the interexchange customers in the UniTel service area who are now served by Verizon (or Verizon and UniTel jointly) from those carriers. It is likely that the customer notice and other requirements of 47 C.F.R. § 64.1120(e) apply to this transaction. That section requires the acquiring carrier to provide 30 days notice to the Federal Communications Commission of its intent to acquire customers and 30 days notice to its customers. The notice must inform customers of the rates, terms and conditions of the acquiring carrier and the right to choose a different carrier. The section authorizes bulk transfers of customers without specific authorization of each customer provided that the acquiring carrier complies with its requirements. Compliance is necessary to avoid liability for unauthorized transfers of

such information as it necessary if we were to decide that expenses and revenues were relevant in a UniTel rate proceeding.

⁵ The Commission mails the annual reporting forms to carriers in January of each year. The completed forms are due by April 1 of each year.

⁶ See full text of Section 11 at footnote 1.

customers, i.e., “slamming.” UniCap’s application includes a sample copy of a notice to customers that appears to meet the requirements of the FCC rule. UniCap has informed the Commission staff that it has sent the notice to customers and has provided notice to the FCC, as required by the FCC regulation.

VII. OTHER REQUIREMENTS

UniCap shall comply with all applicable rules of the Commission and statutes of the State of Maine, including the customer notification rule described in Ordering Paragraph 8.

VII. ORDERING PARAGRAPHS

Accordingly, we

1. Grant, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, the request of UniCap to provide facilities-based interexchange service throughout the State of Maine;

2. Approve UniCap’s proposed Terms and Conditions and Rate Schedules Original Pages 1 through 1 through 12, as filed on May 19, 2004. Those Schedules shall be effective on the date of this Order.

3. Order UniCap to pay interexchange access charges as required pursuant to approved access rate schedules filed by local exchange carriers;

4. Direct that UniCap shall notify each local exchange carrier in whose service area it intends to originate or terminate calls the date on which it will commence providing facilities-based interexchange service, as defined in this Order;

5. Exempt UniCap from the requirements of Chapter 210 of the Commission’s Rules, except that it must report certain revenue and minutes of use information, as described in Chapter 280, § 11(A), on or before April 1 of each year;

6. Apply to UniCap the same exemption from the approval requirement of 35-A M.R.S.A. § 708(1) previously applied to UniTel, Inc. in the September 8, 1998 Order in Docket No. 98-528.

7. Allow UniCap 42 days (6 weeks) to file requests for approval, under 35-A M.R.S.A. § 707(3), of any contracts or arrangements it may have for services or goods with any affiliated interest of UniCap, as defined in 35-A M.R.S.A. § 707(1). Until approval or disapproval of any such contracts or arrangements, the approval requirement of 35-A M.R.S.A. § 707(3) is temporarily waived;

7. Order UniCap to comply with all applicable statutes of the State of Maine and rules of the Commission, including the requirement in 35-A M.R.S.A. § 7307 and

Chapter 292 of the Commission's Rules that interexchange carriers provide notice to all affected customers of any increase to any rate at least 25 days prior to the increase taking effect.

Dated at Augusta, Maine this 22nd day of June, 2004.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.